

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8523

Petition of Next Generation Solar Farm, LLC,)
for a certificate of public good, pursuant to 30)
V.S.A. §248 authorizing the construction of a)
2.2 MW photovoltaic electric generation facility)
off of Field Days Road in New Haven, Vermont)

Order entered: 8/13/2015

ORDER RE: MOTIONS TO INTERVENE

I. INTRODUCTION

On May 8, 2015, Next Generation Solar Farm, LLC, ("NGSF" or the "Petitioner") filed a petition with the Vermont Public Service Board ("Board") for a certificate of public good, pursuant to 30 V.S.A. §248, authorizing the construction of a 2.2 MW photovoltaic electric generation facility off of Field Days Road in New Haven, Vermont (the proposed "Project"). On July 1, 2015, I set a deadline of July 23, 2015, for motions to intervene. Timely motions to intervene were filed by Edward C. Rybka and Kevin J. Commins ("Rybka-Commins"), Gary R. DeVoe and Jill L. DeVoe (the "DeVoes"), Nancy L. Myrick ("Myrick"), Ryan W. McCue ("McCue"), and the Addison County Regional Planning Commission ("ACRPC"). In this Order, I grant these intervention motions as described herein. I also deny the Petitioner's motion that I alter my previous Order granting intervention to the Town of New Haven ("New Haven").

II. PROCEDURAL HISTORY

On May 21, 2015, New Haven filed a motion to intervene in this Docket pursuant to Board Rule 2.209.

On June 2, 2015, the Petitioner filed a response not objecting to New Haven's permissive intervention pursuant to Board Rule 2.209(B), but requesting that New Haven's participation be restricted to only those issues in which New Haven demonstrated an interest.

On June 24, 2015, I granted New Haven party status without limitation as a matter of right pursuant to 30 V.S.A. § 248(a)(4)(F) (the "June 24th Order").

On June 29, 2015, I held a prehearing conference. Also, Rybka-Commins filed a motion to intervene *pro se*.

On July 2, 2015, I issued a scheduling Order and prehearing conference memorandum. In the scheduling Order, I set the July 23, 2015, deadline for intervention motions. Also on July 2nd, the Petitioner filed a Motion to Alter Judgment ("NGSF's Motion").

On July 13, 2015, the DeVoes filed a motion to intervene *pro se*.

On July 22, 2015, New Haven filed a response to NGSF's Motion ("New Haven's Response").

On July 23, 2015, McCue and Myrick each filed motions to intervene *pro se*.

On July 27, 2015, ACRPC filed a motion to intervene.

On July 30, 2015, the Petitioner filed a response to the motions to intervene ("NGSF's Comments"). Also on July 30th, the Vermont Department of Public Service ("DPS" or the "Department") filed a response to NGSF's Motion and to the motions to intervene ("DPS's Comments").

No other comments on the intervention motions or NGSF's Motion were received.

III. THE STANDARD

PSB Rule 2.209 governs intervention in proceedings before the Board.¹

Rule 2.209(A) provides a potential party with intervention as of right "when a statute confers an unconditional right to intervene."

Rule 2.209(B) reserves to the Board the power to grant intervenor status on a permissive basis, when an applicant "demonstrates a substantial interest which may be affected by the outcome of the proceeding." In exercising the discretionary authority reserved in Rule 2.209(B), the Board considers three factors:

(1) whether the applicant's interest will be adequately protected by other parties;

1. See *Petition of Vermont Gas Authorizing the "Addison Natural Gas Pipeline" Project*, Docket 7970, Order of 9/25/14 at 2-3.

- (2) whether alternative means exist by which the applicant's interest can be protected; and
- (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.²

Rule 2.209(C) further provides that the Board may impose certain restrictions on an intervenor in participating in the proceeding. Specifically, the Board may

restrict such party's participation to only those issues in which the party has demonstrated an interest, may require such party to join with other parties with respect to appearance by counsel, presentation of evidence or other matters, or may otherwise limit such party's participation, all as the interests of justice and economy of adjudication require.

IV. MOTIONS TO INTERVENE

1. Positions of the Parties

NGSF

The Petitioner does not object to the permissive intervention of Rybka-Commins, the DeVoes, Myrick, and McCue "limited to Section 248(b)(5) (aesthetics)"³ or to ACRPC "limited to Section 248(b)(1) (orderly development) and Section 248(b)(5) (aesthetics)."⁴ The Petitioner objects to the requests of Rybka-Commins, the DeVoes, and Myrick that the Board address the potential impact of the Project on their property values.

DPS

The Department has "no objection to the motions to the intervene, limited to the interests identified therein."⁵

2. Discussion and Conclusion

In the absence of any objection, I find that Rybka-Commins, the DeVoes, Myrick, and McCue have each set forth a substantial interest that may be affected by the outcome of the proceeding that is sufficient for permissive intervention under Rule 2.209(B). Consistent with

2. See *Petition of Vermont Department of Public Service seeking an Investigation of Fairpoint Communications*, Docket 8390, Order of 1/23/15, at 3.

3. NSGF's Comments at 2.

4. *Id.*

5. DPS's Comments at 1.

Rule 2.209(C), their participation is restricted to only those issues in which they have demonstrated an interest, which in this case is the application of §248(b)(5) (aesthetics). This proceeding will not address the impact of the proposed Project on individual property values.⁶ However, one factor relevant to determining whether the proposed Project will provide an economic benefit to the State is the overall impact of the proposed Project on property values in general.⁷ Thus, these intervening landowners may also address aggregate effects on land value to the extent these bear on the overall economic benefit analysis under Section 248(b)(4).⁸

In the absence of any objection, I find that ACRPC has set forth a substantial interest that may be affected by the outcome of the proceeding that is sufficient for permissive intervention under Rule 2.209(B). ACRPC's participation is restricted to only those issues in which they have demonstrated an interest. In its motion, ACRPC requested to participate and demonstrated an interest in the application of §248(b)(1) (orderly development) and §248(b)(5) (aesthetics, historic sites, air and water purity, the natural environment, and public health and safety).

V. NGSF's MOTION

1. Positions of the Parties

NGSF

NGSF's Motion requests, pursuant to Vermont Rule of Civil Procedure 59(e), that I: (1) alter the June 24th Order and reverse my decision that "H.40"⁹ is applicable to this proceeding because the law took effect after this petition was filed, and (2) limit New Haven's participation to only those issues in which it has demonstrated an interest.¹⁰

New Haven

New Haven responded to NGSF's Motion by arguing that it should be denied because: (1) Vermont Rule of Civil Procedure 59(e) is inapplicable because the June 24th Order was not a

6. See *Vermont Electric Power Co. v. Bandel*, 135 Vt. 141, 145 (1977) (noting that Section 248 proceedings "relate only to the issues of public good, not to the interests of private landowners who are or may be involved").

7. *Green Mountain Power Corp.*, Docket 7628, Order of 9/3/10, at 3 n.3.

8. Docket 7970, Order of 4/12/13 at 8-9.

9. NGSF's Motion at 1.

10. NGSF's Motion at 2.

judgment subject to appeal but was a procedural ruling, (2) 1 V.S.A. §213 and §214(b)(2) do not preclude applying §248(a)(4)(F) because of its unambiguous language, and (3) granting New Haven party status was otherwise in the Hearing Officer's discretion.¹¹

DPS

The Department does not support altering the June 24th Order because "granting the Town full intervenor status was within the Board's authority under Board Rule 2.209, whether §248(a)(4)(F) applies or not" and that "it was reasonable for the Board to look to the provisions of Act 56 for guidance insofar as they represent current public policy and the intention of the State of Vermont with respect to municipal participation in Board proceedings of this nature."¹² The Department also notes that the Petitioner "mischaracterized the Hearing Officer's conclusion as applying more broadly, stating in its Motion to Alter Judgment that 'the hearing officer concluded that H. 40 as signed into law on June 11, 2015, applied to this proceeding.'"¹³

2. Discussion and Conclusion

On June 11, 2015, §248(a)(4)(F) was added to Title 30 by the signing into law of H. 40. This new procedural rule states: "The legislative body and the planning commission for the municipality in which a facility is located shall have the right to appear as a party in any proceedings held under this subsection."

The June 24th Order was limited to the application of a procedural change to the standard for intervention reflected in §248(a)(4)(F). The June 24th Order did not "conclude that H. 40 as signed into law on June 11, 2015, applied to this proceeding"¹⁴ or otherwise make any other provisions of H. 40 applicable to this proceeding. The Petitioner's substantive rights under Section 248 have been unaffected. As argued by New Haven, the June 24th Order is not an appealable judgment, hence V.R.C.P. Rule 59(e) is inapplicable.¹⁵ Similarly, as a procedural

11. New Haven's Response at 1-11.

12. *Id.* at 2.

13. *Id.* at 3, footnote 1.

14. NGSF's Motion at 1.

15. See V.R.C.P. Rule 54(a) which defines "judgment" as "an order from which an appeal lies." See also *In re Joint Petition of Green Mountain Power, Vermont Electric Cooperative, Inc., and Vermont Electric Power Company, Inc.*, Docket 7628, Order of July 12, 2011 (in which a final Order of the Board was reviewed pursuant to V.R.C.P Rule 59(e)).

change, the application of §248(a)(4)(F) to this Docket falls within an exception to the general rule against retroactivity.¹⁶ Nonetheless, as noted by both New Haven and the Department, my determination as to the scope of New Haven's participation was otherwise within my discretion without regard to the new statutory direction for municipalities status effectuated by §248(a)(4)(F). Finally, treating New Haven as a statutory intervening party ensures consistency with current public policy without impacting the substantive rights of the Petitioner as they existed at the time the petition was filed. Hence, NGSF's Motion to Alter Judgment is denied.

So ORDERED.

Dated at Montpelier, Vermont, this 13th day of August, 2015.

s/Michael E. Tousley
Michael E. Tousley, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: August 13, 2015

ATTEST: s/Lars Bang-Jensen
Acting Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@vermont.gov)

16. See 1 V.S.A. §213 and 1 V.S.A. §214(b)(2).